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September 24, 1998

VIA OVERNIGHT DELIVERY
Ms. Magalie Roman-Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

Re: GST Telecom Inc.'s Comments on the Notice of Proposed Rulemaking in CC Docket No. 98-147, Deployment of Wireline Services Offering Advanced Telecommunications Capability

Enclosed please find an original and five copies of GST Telecom Inc.'s comments on the Notice of Proposed Rulemaking in the above-captioned matter.

Please date stamp and return the additional fifth copy of each filing in the postage paid return envelope. Should you have any questions concerning this filing, please direct them to the undersigned at 360-356-7104.

Sincerely,

Barry Pineles

Barry Pineles
Regulatory Counsel for GST Telecom Inc.

Enclosures

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	)	
Deployment of Wireline Services Offering	)	CC Docket No. 98-147
Advanced Telecommunications Capability	)	
	)	

COMMENTS OF GST TELECOM INC.
ON THE NOTICE OF PROPOSED RULEMAKING

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September 25, 1998

Executive Summary

On August 7, 1998, the Federal Communications Commission ("FCC") issued a memorandum opinion and order rejecting requests from the Regional Bell Operating Companies ("RBOCs") to permit them to offer in-region InterLATA data services. At the same, the FCC issued a notice of proposed rulemaking ("NPRM") that suggested an alternative mechanism for the RBOCs and other ILECs to offer advanced data services through unregulated CLEC subsidiaries. The NPRM also proposes enhancements to the FCC rules concerning collocation and access to unbundled network elements, particularly unbundled local loops and sub-loop elements, that will enhance competition.

GST is a facilities-based competitive local exchange carrier that relies on interconnection and access to unbundled network elements to provide competitive local exchange service and exchange access service in ten states and the Commonwealth of the Northern Marianas Islands. For purposes of federal government contracting as well as the Regulatory Flexibility Act (which requires federal agencies to analyze the impact of their rules on small businesses and minimize those adverse effects). GST is a small business.

The outcome of this rulemaking is critical to GST and other CLECs. As a small business competitor of the ILECs, GST is concerned that ILEC entry, particularly through an unregulated subsidiary, poses grave threats to emerging competition in the data transmission market. Nor does GST believe that the FCC efforts to further enhance competition, which GST strongly supports, will ameliorate GST's concerns about the adverse effects that unregulated ILEC subsidiaries will have on competition, especially the smaller competitors of the ILECs.

GST does not believe that the FCC has the legal authority to allow ILECs in general, and RBOCs, in particular, to establish unregulated subsidiaries. GST supports the full legal analysis of this issue undertaken by the Association for Local Telecommunication Services.

GST also opines that there are sound policy considerations for not authorizing ILEC establishment of affiliated CLEC subsidiaries. No matter how much structural separation the FCC mandates, the simple fact of the matter is that any transaction between the ILEC and its CLEC affiliate remains an intracorporate transfer that does not affect the bottom line of the corporate parent. A non-discriminatory price charged to the affiliated CLEC and GST would not affect the ability of the affiliated CLEC to offer a service at a competitive rate (any economic losses redound ultimately to the parent corporation). However, that same rate could prevent GST from offering data transmission services at a competitive rate without potentially absorbing significant financial losses. Ultimately, this could affect GST's ability to raise capital threatening its longtime survival and thereby lessening rather than enhancing competition. When faced with the same potential debilitating effects on competition in the cable television market, the FCC barred franchised cable operators from establishing open video systems in their franchised territory until they faced effective competition. GST believes that rationale applies with equal force to ILEC establishment of CLEC subsidiaries

If the FCC decides to permit affiliated CLEC subsidiaries, GST has the following recommendations to ensure that they do not adversely affect competition. First, the structural separation rules must apply to all ILECs, not just the RBOCs. Second, the FCC should ensure that intracorporate transactions are reviewed by mandating that ILECs file tariffs or contracts for services rendered to the affiliated CLEC. Third, affiliated CLECs cannot have preferential access to operating support systems or information concerning which local loops are DSL-qualified. Fourth, the FCC must mandate that ILECs reopen their interconnection agreements to ensure that their affiliated CLECs are not negotiating new interconnection agreements that incorporate new collocation standards and packet-switching while unaffiliated CLECs must wait for the expiration of their existing agreements to benefit from the new standards for service offerings, collocation, and unbundling. Finally, GST recommends that the FCC impose open network architecture requirements on all ILECs that would make network planning transparent for all CLECs and not prevent affiliated CLECs from gaining a competitive advantage through insider knowledge of network changes.

GST, like all CLECs, has experienced and continues to experience difficulty in physically collocating its equipment at the ILEC central office. GST strongly supports the FCC's efforts to improve the collocation process. In particular, GST recommends that the FCC permit sharing of collocation cages, prohibit minimum sizes for collocation cages, prevent ILECs through their CLEC affiliates from reserving too much space in the central office thereby prohibiting unaffiliated CLECs from obtaining space to physically collocate, and authorize cageless collocation. Finally, GST believes that these rules should be enforceable at either the FCC or the state commission whichever would permit speedier adjudication.

GST has an extensive facilities-based network. Yet, GST, like other CLECs, cannot hope to match the ubiquity of the ILEC network in the foreseeable future. To remedy this problem and ensure the development of competition in the local market, Congress and the FCC authorized CLECs to gain non-discriminatory access to the unbundled local loop of the ILEC. For GST to effectively compete in the DSL market, it must have non-discriminatory access to DSL-qualified unbundled loops. But access to the unbundled loop is not a sufficient precursor to effective competition. Efficient network engineering and development require that GST have access to the digital subscriber line access multiplexer ("DSLAM") at remote concentration devices. More important, GST also must have access to the multiplexer or other equipment located at the ILEC central office through which it provides DSL service. This would be the most efficient mechanism for GST to interconnect its fiber optic network in order to provide DSL, a metallic-based service.

Unbundled non-discriminatory access also means that GST has the same right to control the unbundled loops that it purchases from the ILEC that the ILEC itself has. Thus, GST must be given the right to resell DSL service, the unbundled loops, permit other CLECs to share the frequencies, and otherwise manage the loop in the most beneficial manner to GST.

GST recognizes that there are technological problems associated with DSL service. GST recommends that crosstalk problems be eliminated through power limitations rather than spacing requirements in conduits. The latter alternative raises the possibility that the ILEC or its would be able to limit the ability of other CLECs to offer high-quality DSL service.

GST, as a carrier with fewer legal and technical resources than its ILEC competitors, cannot analyze all the permutations and combinations that the FCC may consider in finalizing its rules. To comply with the Congressional mandate to ensure participation by small businesses in federal agency rulemakings, the FCC should issue a further notice of proposed rulemaking so GST has the opportunity to educate it on the impact of specific regulatory standards.

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COMMENTS OF GST TELECOM INC.
ON THE NOTICE OF PROPOSED RULEMAKING

On August 7, 1998, the Federal Communications Commission ("FCC") released the above-captioned Notice of Proposed Rulemaking ("NPRM") to consider the conditions under which incumbent local exchange carriers ("ILECs") could provide advanced data services pursuant to § 706 of the Telecommunications Act of 1996 ("Telecommunications Act").[1] The FCC also proposes to modify its interconnection requirements, adopted pursuant to § 251 of the Telecommunications Act, in order to increase competition for exchange service and exchange access service as may be necessary to promote effective and full competition in the advanced data services market. GST Telecom Inc. ("GST"), a competitive local exchange carrier ("CLEC"), believes this is one of the most important rulemakings undertaken by the FCC since

[1] Pub. L. No 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 706).

the adoption of the rules governing local competition[2] and represents a unique opportunity to utilize the tools authorized by Congress in the Telecommunications Act to ensure procompetitive conditions in the fastest growing segment of the telecommunications marketplace. GST is concerned, however, that full implementation of the proposed rules, as drafted, could have unintended long-term consequences affecting the ability of CLECs, such as GST, to establish themselves in the telecommunications market before the FCC authorizes the creation of ILEC unregulated CLECs. While GST is not sanguine about the benefits of the FCC's proposal for separate subsidiaries, it fully endorses the efforts to improve the interconnection process and the unbundling of local loops for the provision of advanced data services. These modifications will enhance competition for plain old telephone service as well as advanced data services. And the development of a competitive market is the chief objective of the Telecommunications Act.

I. GST and its Interest in this Rulemaking

GST has certificates of public convenience and necessity to operate as a CLEC in: Arizona, California, Hawaii, Idaho, Nevada, New Mexico, Oregon, Texas, Utah, Washington, and the Commonwealth of the Northern Marianas Islands. As a facilities-based CLEC, GST operates state-of-the-art, digital telecommunications networks that provide an alternative to the ILEC. GST offers a full line of integrated telecommunications products and services, including exchange service, exchange access service, interexchange service, special access services, and

[2] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15,499 (1996) ("Local Competition Order").

Internet and other data transmission services. In an effort to meet the needs of customers with intensive data transmission requirements, GST is currently implementing a Virtual Integrated Transport and Access network utilizing packet switching and frame relays.

GST currently serves 41 markets in those jurisdictions where it operates as a CLEC.[3] GST also constructs, markets, and manages long-haul fiber optic facilities in Arizona, California, and Hawaii. GST's total long-haul fiber optic facilities extend over 1,300 miles and another 1,800 route miles are under construction to become operational within the year. All this in its brief four year history despite the obstacles placed in front of it by ILECs.

Despite the breadth of this network, GST remains a small, entrepreneurial telecommunications company and is considered a small business under the Small Business Act[4] and the Regulatory Flexibility Act ("RFA").[5] In implementing the Small Business Act, the United States Small Business Administration has determined that wireline telephone companies with less than 1,500 employees qualify as "small."[6] The FCC has adopted this definition for

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[3] GST also is authorized to provide interexchange service in 46 states and the District of Columbia.

[4] 15 U.S.C. § 632.

[5] 5 U.S.C. § 601.

[6] 13 C.F.R. § 121.201

purposes of complying with the RFA.[7] GST, as of June 30, 1998, had 1,367 employees and therefore qualifies as a small business.

As a CLEC, GST is dependent, in part, on ILECs for provision of competitive local telephone services through access to local loops, call termination services, and access to sufficient capacity in the central office switches of ILECs. GST, pursuant to § 251(c) of the Telecommunications Act, has entered into interconnection agreements with US West, GTE, Pacific Bell, and Southwestern Bell. Like all CLECs with first generation interconnection agreements, GST routinely experiences difficulties with basic ILEC obligations regarding collocation, timely provisioning of interconnection trunks and multiplexer equipment, loading and testing of NXXs, and interfacing with ILEC operational support systems ("OSS"). Unfortunately, often what is written on paper is not delivered in actuality.

The NPRM has two significant components. One addresses remedies to the problems faced by GST in obtaining interconnection with ILECs. GST strongly supports all efforts of the Commission to improve the interconnection process, particularly in dispute

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[7] The RFA requires that a federal agency adopt the small business definition developed by the Small Business Administration unless the agency develops a different standard, seeks notice and comment of the new size limit, and consults with the Chief Counsel for Advocacy of the United States Small Business Administration. 5 U.S.C. § 601. The FCC has not chosen the latter course and utilizes the Small Business Administration's definition for purposes of compliance with the RFA. NPRM at ¶ 224.

The RFA requires that the FCC determine whether a proposed rule would have a significant economic impact upon a substantial number of small entities and, if it does, examine alternatives that will lessen the impact on those businesses. *See Value Vision Int'l v. FCC*, No. 98-1137, slip op. at 14-16 (D.C. Cir. July 24, 1998).

resolution and in anticipation of future obstacles to the development of a competitive market. In this regard, given GST's experience with interconnection difficulties that it still experiences today on a routine basis, any improvements to the rules concerning collocation and unbundling of loops must be as specific as possible. Otherwise, ambiguity and imprecision gives the ILECs the opportunity to deny, delay or litigate GST's interconnection requests. The other aspect of the NPRM addresses the conditions under which ILECs will be able to offer advanced data services under the Telecommunications Act. As a small business competitor of the ILECs, GST is concerned that ILEC entry, particularly through an unregulated subsidiary, poses grave threats to emerging competition in the data transmission market

II. Statutory Framework

The Telecommunications Act requires that all telecommunications carriers permit interconnection to their networks by other carriers.[8] The FCC has determined that this obligation is substantially less stringent than the interconnection obligations of ILECs.[9] For nondominant carriers, such as GST, the interconnection requirement may be met through indirect connections.[10]

The interconnection obligations of ILECs are far more encompassing. Under § 251(c), ILECs are required to: a) negotiate in good faith interconnection agreements with

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[8] 47 U.S.C. § 251(a).

[9] *Local Competition Order*, 11 FCC Rcd at 15,991.

[10] *Id.*

competing carriers; b) provide for direct interconnection with the ILEC network through collocation of facilities; c) provide for unbundling of network elements needed to provide service; d) permit resale of service at avoided cost;[11] and e) provide reasonable notice of changes that would affect the interoperability of interconnecting carriers.

While these obligations apply to all ILECs, they are particularly significant to the RBOCs. The Telecommunications Act prohibits the RBOCs from providing in-region InterLATA service until the FCC determines that the RBOC satisfies a 14-point checklist (which mirrors the obligations of interconnection) and that its provision of in-region InterLATA service would be in the public interest.[12]

The NPRM was initiated, in part, as a response to RBOC requests to provide advanced data services pursuant to § 706 of the Telecommunications Act.[13] Each of the RBOCs requested that the FCC forbear or take other regulatory steps that would enable them to offer in-

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[11] An ILEC's wholesale rate is based on the costs it does not incur to provide service at the retail level, such as billing, collection, advertising, customer premise installation, etc.

[12] 47 U.S.C. § 271.

[13] Section 706(a) provides, in pertinent part:

> The Commission ... shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans by utilizing ... regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

region InterLATA services for the purposes of providing advanced data transmission services, particularly digital subscriber line services ("DSL")[14] In short, the RBOCs requested that the FCC authorize them to provide service irrespective of whether they have met the tests set out in § 271 or their interconnection obligations under § 251(c)

In an opinion issued coetaneous with the NPRM, the FCC rejected the RBOCs requests for various exemptions from §§ 251 and 271 in order to provide advanced data services. The FCC concluded that it does not have the authority to forbear from regulating RBOCs pursuant to these sections until such time as a competitive market exists in local telecommunication services.[15]

III. The NPRM

The Commission denied the petitions of the RBOCs but issued the instant NPRM to investigate the conditions under which all ILECs and particularly the RBOCs, could offer advanced data services.[16] The Commission proposes that ILECs be permitted to establish CLEC

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[14] DSL covers a range of technologies which enable normal twisted-pair telephone lines to accommodate high-capacity bandwidth signals that those lines would otherwise be incapable of transmitting.

[15] *Petitions of Bell Atlantic Corp.*, CC Docket No. 98-11; *US West Communications, Inc.*, CC Docket No. 98-26; *Ameritech Corp.*, CC Docket No. 98-32; *Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell*, CC Docket No. 98-91, and *Association for Local Telecommunication Services*, CC Docket No. 98-78, Memorandum Opinion and Order, FCC 98-188, slip op. at 8 (Rel. Aug. 7, 1998).

[16] NPRM at ¶ 83

subsidiaries which would not be subject to regulation as ILECs.[17] These CLEC affiliates would not be subject to the same interconnection requirements as their ILEC parents. The FCC expects to avoid potential cross-subsidization and parent-corporate subsidiary favoritism by requiring the CLEC affiliate to operate independently of the ILEC parent under a regulatory regime similar to, and in some ways, stricter than that set out in the *Non-Accounting Safeguards Order*.[18]

The FCC appears to recognize that granting ILECs, and in particular the RBOCs, the authority to establish in-region CLECs that are unbridled by regulation could decrease potential competition in the local exchange market. To counter that possibility, the FCC proposes a host of changes to its rules regarding collocation of equipment in ILEC central offices[19] and the establishment of new rules concerning the availability of unbundled loops, especially those that are DSL-qualified.[20] The FCC also requests comments on whether advanced services, such as DSL, should be subject to the resale obligations of the Telecommunications Act.[21] Finally, the FCC requests comments on what, if any, LATA

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17 *Id.* at ¶ 85

18 *Id.* at ¶¶ 95-117; *see Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21,905 (1996) ("Non-Accounting Safeguards Order").

19 NPRM at ¶¶ 119-50.

20 *Id.* at ¶¶ 151-84.

21 *Id.* at ¶¶ 185-89.

boundary modifications or relief it should undertake to permit the RBOCs' CLEC affiliates to provide in-region InterLATA service.[22]

IV. The Telecommunications Act Triad – Competition, Equality, and Quality

GST views this proceeding as an effort to improve the triad associated with the Telecommunications Act – providing customers with quality service through increased competition while ensuring that ILECs (and especially RBOCs) do not have any substantive competitive advantages arising from their prior status as monopoly-service providers. GST strongly supports all FCC efforts that enhance this triad. GST opines that the changes suggested in these comments will further enhance the competitive capabilities of CLECs, ensure equal treatment of all telecommunication service providers, increase the quality of telecommunications services (particularly high-speed access to the Internet) to all Americans, and reduce burdens on small businesses.[23]

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[22] *Id.* at ¶¶ 190-96. For the sake of brevity, GST supports the position of the Association for Local Telecommunication Services ("ALTS") concerning LATA boundary modifications.

[23] GST is not filing separate comments, as required by FCC procedure, on the initial regulatory flexibility analysis mandated by the RFA. One of the primary purposes of the RFA is to increase small business participation in federal agency rulemakings. 5 U.S.C. § 609; *see infra* Part VIII. However, the FCC, in an effort to reduce its own burdens, requires separate comments on the initial regulatory flexibility analysis. Thus, the FCC, in carrying out its statutory mission to reduce regulatory burdens on small business, actually imposes a more burdensome reporting requirement on small carriers, such as GST, than it does on SBC or Bell Atlantic. Those entities are only required to make one filing while GST, should it wish to comment on the initial regulatory flexibility analysis and the rulemaking, must prepare two separate filings. The irony of that situation needs no further expatiation. GST recognizes that this is not the appropriate
(continued...)

V. The FCC's Proposal for Establishment of Structurally Separate Subsidiaries will not Promote Deployment of Advanced Services while Ensuring Full Competition

The basic relief that the FCC proposes to grant RBOCs and other ILECs is the ability to create affiliated CLECs for operation in their service territories under a regime similar to that set forth in the FCC's *Non-Accounting Safeguards Order*.[24] Under the FCC's proposal, these CLEC affiliates would be just like any other CLEC affiliate, unregulated, allowed to provide in-region InterLATA service, and obtain interconnection, unbundled network elements, and collocation from the ILEC parent.[25] The FCC apparently accepts the arguments of the RBOCs that if they are released from regulation they will be more than willing to provide these advanced services.[26]

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[23](...continued)
proceeding to address these procedural requirements and will attempt to remedy this situation in another forum.

[24] Transactions between a structurally separate affiliate and the RBOC are governed by the rules set forth in the *Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, FCC 96-490, slip op. (Rel. Dec. 24, 1996) ("Accounting Safeguards Order"). *See Non-Accounting Safeguards Order* at ¶ 181.

[25] NPRM at ¶ 85

[26] And yet another plaintive cry goes up from the RBOCs to free themselves from the shackles of regulation and behold the telecommunications wonders that will befall the citizens of the United States if they are so released. This "woe is me" tale from the RBOCs with promises of future delights represents a continuing RBOC saga. Yet, despite capitulation from policymakers, RBOC promises remain unfulfilled. Just ask any Bell Atlantic customer in Manhattan attempting to use the brand new 56K modem on his or her computer; what they get is download speeds no faster than 26.4 kbps. Bell Atlantic's response is buy expensive ISDN service or suffer with the slow speeds. R. Fixmer, *Phone Companies Create Traffic Jam on*
(continued...)

GST has four primary problems with the FCC's conclusion. First, the FCC does not have the legal authority to authorize the establishment of separate RBOC or other ILEC data subsidiaries pursuant to §§ 272 and 251(h).[27] Second, structurally separate subsidiaries will not prevent anticompetitive behavior Third, recognition of this anticompetitive behavior and application of the FCC's open video system rules militate against the establishment of ILEC-affiliated CLECs. Third, to the extent that rules are established for structurally separate subsidiaries, identically tough rules on separation must apply to all ILECs -- not just the RBOCs. Finally, GST opines that the FCC's proposal on structuring the affiliate relationship does not provide sufficient protection to ensure equality between ILEC-affiliated CLECs and independent CLECs and therefore, would be counterproductive to the development of a effectively competitive market for advanced data services; a result directly counter to the intent of the Telecommunications Act.

A. Structurally Separate Subsidiaries Do Not Create Level Playing Fields for All CLECs

[26](...continued)
Road to Internet, N.Y. Times B10 (Sept. 1, 1998). Despite Bell Atlantic's inability to provide customers with adequate service under current technology, it must be free from regulation to provide advanced services. GST suggests that RBOCs first comply with their current obligations to customers and CLECs before taking on new responsibilities that leave existing customers languishing in the slow lane of the information superhighway.

[27] For the sake of brevity, GST will not reiterate arguments of others in this proceeding who will address the legality of the FCC's proposal. GST fully concurs with the legal analysis proffered by ALTS filed in response to the NPRM.

The FCC tentatively concludes that its structural separation rules will prevent improper discrimination against independent CLECs and improper cost allocation between the affiliate and the ILEC parent[28] This conclusion misses the point concerning structurally separate subsidiaries. They remain part of the same parent corporate entity -- the ILEC that dominates the local telephony market.

The FCC's emphasis is on theoretical fairness. Yet, the FCC fails to consider that an affiliated-CLEC payment for a service from an ILEC constitutes nothing but an intracorporate transfer which cancels itself out on the books of the corporate parent. In contrast, non-affiliated CLECs' payments for services to an ILEC is a real cost on their books and bottom line. In turn, this could adversely affect the ability of the CLECs to attract equity or low-cost debt financing, or even providing the service at competitive rates The end-result would be lessening competition in the marketplace not enhancing it as mandated by the Telecommunications Act

Consider the following example. Effective provision of DSL service requires copper wire lines that are free of amplifiers, bridge taps remote concentrators and other types of electronics Steps taken to remove these impediments are routinely referred to as loop qualification. Assume that DSL loop qualification costs the ILEC \$100 per 1,000 feet of line. If the ILEC affiliate charges \$100 to its CLEC affiliate, the corporate parent absorbs a \$100 cost but receives a \$100 payment from the affiliate so the net effect on the consolidated parent's bottom line is, effectively, zero. In contradistinction, the \$100 charge to GST from an ILEC

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[28] NPRM at ¶ 97

represents a cost to GST and a $100 revenue gain to the ILEC corporate parent. If this cost is sufficiently high, GST will not be able to provide DSL service on a competitive basis. No amount of structural separation rules can overcome this competitive advantage to the ILEC.

Other problems exist as well. Under the *Non-Accounting Safeguards Order*, the FCC permits structurally separate subsidiaries to jointly market various services. This constitutes an enormous competitive advantage for the affiliated CLECs. GST's interexchange operations face the problem of joint marketing in Hawaii where GTE's customer service representatives ("CSR") suggest that a customer signing up for local service select GTE Long Distance as the customer's presubscribed interexchange carrier. The cost of CSRs is probably allocated entirely to the local service giving GTE Long Distance a competitive advantage since it does not have to pay for CSRs provided by GTE's regulated ILEC. GST has no doubt that similar joint marketing (and concomitant cost savings) would occur with respect to an ILEC's affiliated CLEC. This and other types of joint marketing (bill inserts, combined billing) provide a substantial economic benefit to the affiliated CLECs that are unavailable to GST.

These and other competitive advantages available to an unregulated CLEC affiliate cannot be ameliorated through any structurally separate subsidiary requirement. Thus, the FCC, rather than promoting competition, will further entrench the power of the existing dominant market participant -- the ILEC by relying solely on the provisions of its *Non-Accounting Safeguards Order*

B. Sound Public Policy as Announced in the FCC's Open Video System Order Militates Against Establishment of ILEC-affiliated CLECs Until the ILECs Have Effectively Implemented § 251(c) of the Telecommunications Act

The primary objective of Congress in enacting the Telecommunications Act of 1996 was to increase facilities-based competition in the delivery of services that were previously delivered by a single dominant facilities-based provider.[29] In implementing the open video system requirements of the Telecommunications Act, the FCC was faced with a problem similar to the one that it is grappling with in the instant proceeding. There, the FCC had to determine whether incumbent cable operators would be permitted to establish open video system operations in their franchised cable territories.[30]

According to the FCC, the "underlying premise of Section 653 is that open video system operators would be new entrants in established markets, competing directly with an incumbent cable operator."[31] The FCC opined that open video system operators were exempted from many of the regulations applicable to franchised cable operators as an inducement to entry and to relieve them of regulatory burdens in their efforts to win customers from the entrenched

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[29] H.R. Conf. Rep. 458, 104th Cong., 2d Sess. 178 (1996); *Local Competition Order*, 11 FCC Rcd at 15,505.

[30] One of the primary distinctions between an open video system operator and cable operator is the exemption of the open video system operator from the franchising requirements of the Cable Communications Policy Act of 1984. 47 U.S.C. § 573(c) (1)(C).

[31] *Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems*, CS Docket No. 96-46, FCC 96-249, Second Report and Order, slip op. at ¶ 24 (Rel. June 3, 1996) ("OVS Order").

cable operator.[32] The FCC concluded that it would not be in the public interest to allow franchised cable operators to establish open video systems in their franchised territories, at that time, because they would then be free from regulation and such freedom would not be in the public interest.[33] However, a franchised cable operator that faced effective competition[34] would be authorized to establish an open video system in its franchised territory. In such cases, the harm to competition and consumers would not be possible since a customer could simply switch providers.

The logic of the FCC's determination in the *OVS Order* applies with equal force to the establishment of ILEC-affiliated CLECs. There is no fundamental distinction between the harm to competitors and consumers from allowing RBOCs to create CLEC affiliates and the harm that the FCC wished to stop by prohibiting cable operators from establishing open video system subsidiaries in their franchised cable territory. In both instances, new entrants would face formidable barriers in establishing a competitive foothold in mature markets. More significantly, consumer welfare would be harmed in the long-run from the absence of facilities-based competition. For these reasons, it is not in the public interest for RBOCs (or for that matter any ILEC) to operate a CLEC affiliate in its service territories

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32 *Id.*

33 *Id.* at ¶¶ 24-25

34 Effective competition is defined in 47 U.S.C. § 543(l) and basically requires the existence of a competing facilities-based multichannel video programming distributor. In this regard, the definition is not substantially different than the facilities-based competition requirement of § 271 of the Telecommunications Act.

C. Should the FCC Permit Establishment of CLEC Affiliates, the Requirements Must Apply to all ILECs and not just the RBOCs

The FCC requests comments on whether the structural separation requirements should apply to all ILECs.[35] GST strongly recommends that the FCC, should it adopt a structural separation requirement, impose the identical separation requirements on all ILECs.

As already noted, RBOCs are prohibited from offering in-region InterLATA service. Congress created a carrot-and-stick approach to the removal of that debarment. RBOCs are required to meet the 14-point checklist, i.e., not obstruct facilities-based competition, and, if they are compliant, they would be permitted into the promised land. Thus, the RBOCs have a substantial incentive to comply with their interconnection obligations. Similarly, they also would have an incentive to ensure that their CLEC affiliates would not receive preferential treatment in relation to other CLECs. If they provided preferential treatment, the FCC could determine that a RBOC's application to provide in-region InterLATA service be denied on § 271's public interest standard.

Other ILECs, such as GTE, are not subject to the same restrictions as the RBOCs with respect to the provision of in-region InterLATA service. In turn, they do not face the same incentives for complying with their statutory obligations under § 251(c) because there is nothing that the FCC can deny them with respect to the lines of businesses that can operate. Enabling these ILECs to establish structurally separate subsidiaries under a looser regulatory rein than that

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[35] NPRM at ¶ 98

imposed on the RBOCs simply would exacerbate an already untenable position.[36] The ILECs would establish separate CLEC subsidiaries, provide them with preferential treatment in pricing, interconnection, etc., and the non-affiliated CLECs would be left to litigate these issues at the FCC, the state regulatory bodies, or in court. None of those alternatives are likely to promote the development of competition in the provision of advanced data services in such places as Hawaii, where GST is primary competitor against GTE. The only way to ensure that non-RBOC ILECs treat all CLECs equally, be it their own or an independent CLEC, is for the FCC to mandate their compliance with the structural separation requirements imposed on the RBOCs.

D. The FCC's Proposed Structural Separation Requirements do not Provide Adequate Protection to Independent CLECs

The FCC proposes that ILECs establish structurally separate CLEC subsidiaries. The affiliates would have to operate independently from the ILEC[37] and could not jointly own any switching facilities or the land or buildings in which such facilities are located. All transactions between the affiliate and the ILEC would be on an arms-length basis, in writing and made available for public inspection.[38] Rates for services provided by the ILEC to the affiliate,

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[36] In particular, GST has experienced substantial difficulties with GTE in obtaining interconnection as mandated by federal statute, state commission order, and contract. For example, in Hawaii, GST has been denied physical collocation of transmission equipment at several GTE tandem locations forcing GST to litigate space availability on a tandem-by-tandem basis.

[37] *Id.* at ¶ 96. The term "operate independently" has the same meaning as that term is used in the *Non-Accounting Safeguards Order*

[38] *Id.*